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No. 96-775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

TRAIL MOUNTAIN COAL COMPANY,
Petitioner,

v.

THE UTAH DIVISION OF STATE LANDS AND FORESTRY; RALPH MILES, Director of the Division of State Lands and Forestry; THE UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, Executive Director of the Utah Department of Natural Resources,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, *amicus,* National Mining Association, respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of the brief and a copy of petitioner's written consent has been filed with the Clerk of this Court. This motion is made necessary because the respondent State of Utah has withheld consent.

Amicus, a national trade association whose members include companies that produce most of the Nation's minerals, has a strong interest in legal matters that affect

the acquisition, production and sale of minerals. This case, which involves a mineral lease entered into between the petitioner and the State of Utah, presents the question whether the Contract Clause permits a State to retroactively and substantially alter its contract rights. A vital part of the mineral resource base developed by *amicus*' members is comprised of minerals leased from the States in their proprietary capacity. Accordingly, *amicus* has a compelling interest in this question which goes to the core mission of the Contract Clause, and the limits of the government's power to alter the contractual relationships which supply the legal foundation for the mining industry's right to develop its resource base.

Because the question presented by the petition is of great importance to *amicus*' members who must do business with the States, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* THE NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONER

INTERESTS OF THE *AMICUS CURIAE*

The National Mining Association is a trade association representing mining companies that produce most of the Nation's minerals. Its members also include other key segments of the mining industry—manufacturers of equipment, resource developers, and transporters of the products of mining.

The mining industry produces vital resources needed to fuel our economy and manufacture virtually all com-

modities sold in domestic and foreign markets. Coal is used to generate 56% of the electricity consumed on an annual basis in the United States. Mining companies produced $39 billion worth of nonfuel minerals last year, which in turn were used to manufacture $395 billion worth of products for use by Americans and for export to trading partners around the world.

The principal purpose of *Amicus* is to represent those with interests in the Nation's mineral resources industries in the important public policy issues affecting the development and use of mineral resources. Toward this end, *Amicus* seeks to develop policies that will foster the efficient production, distribution and use of mineral products. The Utah Supreme Court's disregard of the Contract Clause in construing the terms of a state mineral lease seriously undermines such policies.

ARGUMENT

REVIEW IS WARRANTED TO CLARIFY THE LIMITS OF THE GOVERNMENT'S POWER TO ALTER THE LEGAL RELATIONSHIPS THAT SUPPLY THE MINING INDUSTRY'S RIGHTS TO DEVELOP MINERAL RESOURCES.

The decision of the Supreme Court of Utah disregards this Court's longstanding precedent establishing the scope of contract terms protected from impairment under the Contract Clause of the United States Constitution (art. I, § 10, cl. 1), *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535 (1867); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). By ignoring the longstanding principle that the state laws in existence at the time of the making of the contract indeed form part of it, the court below evaded the heightened scrutiny that follows when "the State's self-interest is at stake." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977).

The Supreme Court of Utah's departure from a principled approach to Contract Clause analysis raises very serious questions concerning whether the mining industry can develop its reserve base in reliance upon contractual relationships with States that provide the right to mine State-owned minerals. The resource base developed by *Amicus'* Members is comprised of minerals located on private, federal and state lands. The rights to develop these resources are obtained by location, sale, or lease, depending upon the type of minerals, ownership, and applicable state or federal laws.

The right to develop State-owned minerals is generally acquired by contract in the form of a mineral lease with the terms and conditions negotiated with the State in its proprietary capacity. Like other contracts, the material terms of a mineral lease include both the expressly bargained-for obligations and those laws in effect at the time of the agreement that affect its interpretation and enforcement. All of these material, or essential, terms formulate the basis of the parties' legitimate economic expectations under a mineral lease.

This case presents the question whether the Contract Clause permits a State lessor to upset these legitimate economic expectations by a retroactive and substantial change in terms related to the enforcement of the lease. *Amicus* submits that the approach employed by the Utah Supreme Court not only lacks constitutional foundation, but effectively allows the State to opt out of Contract Clause scrutiny for any change to state laws that affect the construction or enforcement of the State's contractual rights. This constitutionally problematic result merits the Court's attention.

In reliance on contractual relationships similar to the one here, the mining industry has committed substantial capital investments and planned existing operations to develop State-owned minerals. If other States follow the approach used below, the contracts that provide the legal

foundation for the industry's right to mine will be subject to the fluctuating policy whims of the various States. The decision below provides other States with a recipe for evasion of Contract Clause scrutiny when they change their laws in a manner that drastically alters the terms and conditions of their contractual rights.

The Nation's mining industry needs to know the limit of the government's power to alter legal relationships which supply the industry with the rights to develop its mineral resource base. Last Term, this Court reaffirmed the principle that when the government contracts with its citizens, its rights and duties are governed by the same laws applicable to contracts between its citizens. *United States v. Winstar Corp.*, 116 U.S. 2432, 2464 (1996). This case presents the opportunity to clarify whether the same principle obtains under the Contract Clause where the alteration in State law is directly aimed at the State's self-interest.

A. The Utah Supreme Court's Disregard of Controlling Precedent Creates Improper Uncertainty in Previously Settled Areas of the Law

Just last Term, this Court "consider[ed] the extent to which special rules, not generally applicable to private contracts, govern enforcement of * * * governmental contracts * * *." *United States v. Winstar Corp.*, 116 S.Ct. 2432, 2447-2448 (1996). In *Winstar*, the Court concluded that, when government "contracts are made in reliance on the law of contract," such contracts should be enforced according to their terms. 116 S.Ct. at 2459 (citing Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. Leg. Stud. 83, 88-89 (1977), for the proposition that "parties generally rely on contract law 'to reduce the costs of contract negotiation by supplying contract terms that the parties would probably have adopted explicitly had they negotiated over them' "). The Utah Supreme Court disregarded a prejudgment interest term

provided by "the law of contract" (*Winstar*, 116 S.Ct. at 2459) and, instead, allowed the State of Utah to retroactively treble its contractual entitlement to prejudgment interest. Pet. App. A 8a. This dramatic departure from established principles warrants review.

The Utah Supreme Court's decision creates grave uncertainty regarding a State's ability to alter its contractual rights and obligations. *Winstar* held that the enforcement of government contracts is "dictated by normal principles of contract interpretation." *Winstar*, 116 S.Ct. at 2477 (Scalia, J., joined by Kennedy and Thomas, J.J.); *accord* 116 S.Ct. at 2453, 2459 (opinion of the Court) ("applying ordinary principles of contract construction and breach" to the enforcement of a contract with the federal government). Here, by the express admission of the Utah Supreme Court, the application of "ordinary principles of contract construction and breach" (116 S.Ct. at 2453) would preclude the retroactive trebling of the State of Utah's prejudgment interest award. Pet. App. E 63a (Utah Supreme Court concedes that, "if the [State] lacked authority to set [higher] interest rates and penalties," "under our decision in *SCM Land Co. v. Wakins & Faber*, 732 P.2d 105 (Utah 1986) [the 6% prejudgment interest rate set by] section 15-1-1 would apply"). The Utah court's refusal to apply "ordinary principles of contract construction and breach" to Petitioner's contract seriously undermines what this Court accomplished last Term. *Winstar*, 116 S.Ct. at 2453.

The decision below not only undermines *Winstar*, it flatly conflicts with numerous other pronouncements from this Court. To begin with, the Utah Supreme Court has authorized a dramatic, $4 million, *retroactive* alteration of a contract, contrary to the long-standing judgment that a State's alteration of contractual obligations is unconstitutional when it "work[s] a severe, permanent, and immediate change in [contractual] relationships irrevocably and retroactively." *Allied Structural Steel Co. v. Span-*

naus, 438 U.S. 234, 250 (1978). *Accord, Sturges v. Crowninshield*, 4 Wheat. (17 U.S. 122 (1819); *Ogden v. Saunders*, 12 Wheat. (25 U.S.) 213 (1827) (State insolvency laws may not be applied retroactively).[1]

In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), moreover, this Court established that a State's

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[1] *Accord, Hughes v. State*, 838 P.2d 1018, 1034 (Ore. 1992) (prospective elimination of tax exemption passes constitutional muster, but retroactive elimination of exemption violates Contract Clause); *Whirlpool Corporation v. Ritter*, 929 F.2d 1318, 1321-1323 (8th Cir. 1991) (retroactive application of Oklahoma statute designating current spouse as life insurance beneficiary following a divorce violates the Contract Clause; the statute "effects direct and fundamental changes to pre-existing contracts" and is therefore unreasonable because "individuals are entitled to rely on the law governing insurance contracts as it existed when the contracts were made"); *Geary Distributing Co. v. All Brand Importers, Inc.*, 931 F.2d 1431, 1434 (11th Cir. 1991) (retroactive application of beer distribution statute violates Contract Clause); *Minnesota Association of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442, 451 (8th Cir. 1984) (although state may prospectively alter health care reimbursement rates without violating the Contract Clause, it may not do so retroactively; "Because of its retroactivity, the statute imposes totally unexpected liability on nursing homes for charges that were permitted by law when collected" and unconstitutionally "disrupts settled and completed financial arrangements under contracts made in reliance on existing law"). *LaFortune v. Naval Weapons Center Federal Credit Union*, 652 F.2d 842, 847 (9th Cir. 1981) (retroactive application of homestead exemption violates Contract Clause); *Carter v. Government Employees Insurance Co.*, 377 So.2d 242, 243 (Fla. App. 1979) ("It is a well-settled proposition of law that contracts are made in legal contemplation of the existing applicable law," therefore, "[t]o retroactively apply this statute to an insurance contract entered into before its enactment would be an unconstitutional impairment of contract"). *Cf. Blue Cross and Blue Shield of Kansas City v. Bell* F.2d 1331, 1337 (10th Cir. 1986) (statute mandating certain provisions in health insurance policies does not violate the Contract Clause because it "applies only to contracts of insurance issued or renewed" and, therefore, "no sudden, totally unanticipated, and substantially retroactive obligation burdens these contractual relationships").

alteration of its contractual rights violates the Contract Clause unless that alteration is supported by an "important public purpose" and is "reasonable and necessary to serve" that purpose. 431 U.S. at 22. This analysis is almost always fatal "because the State's self-interest is at stake." 431 U.S. at 25-26.[2] Undoubtedly aware of this reality, the Utah Supreme Court attempted to avoid *United States Trust* by announcing that the State's augmentation of its right to damages "did not alter any of the essential elements of the contract." Pet. App. A 8a n.8. But, in its haste to avoid *United States Trust*, the Utah court ran afoul of consistent judgments of this Court dating from at least 1867. *E.g., Von Hoffman v. City of Quincy*, 4 Wall. (71 U.S.) 535, 549 (1867).

The Petition (at 12-19) adequately explicates the well-established rule that laws affecting the "validity, construction, discharge, and enforcement" of contracts—including "the obligations of the debtor to pay interest after the maturity of the debt, where the contract is silent"—are incorporated into *all* contracts and *are* subject to Contract Clause scrutiny. *Von Hoffman, supra*, 4 Wall. (7 U.S.) at 549. It suffices to note, therefore, that the Utah Supreme Court's holding below cannot be squared with decisions from *Von Hoffman* through *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). This bald conflict creates untoward uncertainty in a previously settled (and important) area of the law. The Court should grant review to eliminate that uncertainty.

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[2] *E.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n. 14 (1983) ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets"); Schwartz, *Old Wine In Old Bottles? The Renaissance of the Contract Clause*, 1979 Sup. Ct. Rev. 95, 109 (1980) (noting that, in private contract cases "the emphasis on review is on the adjective 'reasonable,'" while "[i]n public contract cases, the emphasis is on the adjective 'necessary'").

B. The Lower Court's Disregard of the Fundamental Mission of the Contract Clause Creates Serious Difficulties for Everyone Contracting with a State

The decision below not only creates legal uncertainty, it has the potential to generate serious economic disruption throughout the Nation. For the first 100 years of this country's existence, the Conract Clause "was the major restraint on state economic regulation." Gerald Gunther, *Constitutional Law* 478 (12th ed. 1991). Although this Court's increasing accommodation of state legislative authority resulted in a gradual loosening of the Clause's strictures (*see, e.g., Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437-438 (1934),[3] the Clause has never been moribund.[4] The reason why is clear: the

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[3] *E.g., Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 432 (1837) (charter to operate a bridge was not violated by subsequent legislative charter granted to a competitor); *Stone v. Mississippi*, 101 U.S. 814, 817-820 (1880) (no violation of clause even though state-chartered lottery company was rendered valueless by subsequent abolition of lotteries); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 667-670 (1878) (state may enact legislation regulating transportation of fertilizer notwithstanding prior charter granted to fertilizer company).

[4] *Blaisdell* is widely cited as the wellspring of the modern, lenient interpretation of the Contract Clause. *E.g.*, Gerald Gunther, *Constitutional Law* 478-479 (12th ed. 1991). Examination of *Blaisdell*, along with decisions rendered shortly after that opinion, however, indicates that the *Blaisdell* Court did not intend to eviscerate the Contract Clause. Although extending the contractual period for mortgage redemption (compare U.S. Const., Art. I, § 10, cl. 1), the Court emphasized the emergency nature of the legislation (290 U.S. at 425, 439-430, 444-445) and expressly emphasized that the statute was only a "limited and temporary interposition" that granted "temporary relief" by means of a "temporary and conditional restraint." 290 U.S. at 439-40. And, a mere four months after *Blaisdell*, the Court invalidated a state law under the Contract Clause that was not intended to deal temporarily with an emergency. In *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934), Chief Justice Hughes (who authored *Blaisdell*) wrote for the Court that an Arkansas law that exempted most life insurance policy payments from garnishment violated the Contract Clause because

protection of contractual rights and duties was central to the Founder's conception of liberty.[5] The Utah Supreme Court's blatant disregard of a previously unquestioned contractual right and duty (*e.g.*, "the obligation[] of the debtor to pay interest after the maturity of the debt [at a statutory rate] where the contract is silent," *Von Hoffman, supra*, 4 Wall. (71 U.S.) at 459) creates serious difficulties for everyone—and particularly the members of the National Mining Association—who must do business with a State.

The Utah court has decreed that Petitioner cannot expect that its contract with the State of Utah will be governed by the same rules applicable to other, private contracts. Pet. App. A 8a & n.8 (court concludes that Utah may retroactively treble its damage recovery, a power accorded no other contracting entity, without impairing "any of the esential elements of the contract"). This

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it was "neither temporary nor conditional." 292 U.S. at 433-434. *See also W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 63 (1935) (invalidating another Arkansas statute limiting contractual rights because it was not carefully limited in duration) (Cardozo, J.); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 597-598 (1935) (invalidating a provision of the federal Bankruptcy Act on retroactivity grounds and distinguishing *Blaisdell*) (Brandeis, J.); *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936) (invalidating Louisiana statute on Contract Clause grounds); *Wood v. Lovett*, 313 U.S. 362 (1941) (invalidating state law, enacted after the sale of state lands, that adversely affected title to the lands). The Court that decided *Blaisdell*, therefore, certainly did not believe that the Contract Clause was an ineffective (or even minor) limit on State legislative authority.

[5] The Framers attached significant importance to the protection of property rights. *The Federalist* No. 10 (Madison) at 78 (C. Rossiter ed. 1961) ("the protection of [the] faculties of acquiring property is "the first object of government"). The Clause, together with prohibitions against bills of attainder and ex post facto laws (also contained in Article I, Section 10, Clause 10 of the Constitution), was intended as a "constitutional bulwark in favor of personal security and private rights." *The Federalist* No. 44 (Madison) at 282 (C. Rossiter ed. 1961).

patently unconstitutional result harms not only Petitioner, it threatens serious nationwide injury. If followed outside Utah, this analysis will injure every entity executing a contract with a State.

This Court, in construing the Contract Clause, has already noted that "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised." *United States Trust Co., supra*, 431 U.S. at 25-26. Absent review, the Nation's mining industry will become a ready target for States interested in raising painlessly (at least from the ordinary taxpayer's perspective) "extra money." *Id.* In the context of the various business affiliations between *Amicus'* Members and numerous States—the range of which extends from the leasing of State lands and minerals to the sale of mineral products to State facilities—the respective rights and obligations are memorialized in contracts that, among other things, establish the rights and remedies available upon contractual breach. If, as the Utah Supreme Court has decreed (Pet. App. A 8a), these States are now free to alter at will the "remedial" provisions of their contracts without running afoul of the Contract Clause, the core mission of the Contract Clause—to prevent "sudden changes and legislative interferences[] in cases affecting personal [economic] rights" *The Federalist* No. 44 (Madison) at 282 (C. Rossiter ed. 1961))—will be eviscerated.

The ensuing disruption of legitimate economic expectations, moreover, will be substantial. The mineral leases under which Members of the Association operate are often intricate, ambiguous and incorporate detailed state and federal regulations ranging from environmental protection to miners' safety and health.[6] And, as in this case, the breach of these multifarious obligations may incur unintentionally and despite the good faith of the breaching party. *See, e.g.*, Pet. App. A 4a (Petitioner

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[6] *See* 3 *Am. L. of Mining* § 63.05 (2d ed. 1984).

held to have breached royalty payment obligation even though "various [State] employees apparently informed [Petitioner] that 15 cents per ton was the correct rate for the lease").

As a result, opportunities for the States to raise additional funds from the pockets of "breaching" promisors will abound, often despite the best efforts and diligent good faith of the "breaching" parties. Cash-starved States throughout the Nation should not be allowed the opportunity (accorded by the decision below) to survey their existing portfolio of contracts with the clear goal of retroactively augmenting their economic rights. Such an effort undoubtedly occurred here. Pet. App. A 4a (after informing Petitioner that it had paid "the correct rate for the Lease," the State of Utah nevertheless "conducted an audit" to determine whether the "passage of the Federal Coal Leasing Amendments and accompanying regulations" had imposed "a duty to pay" a significantly higher royalty). Such an effort, just as undoubtedly, is unconstitutional.

Alexander Hamilton summarized the views of the Founders when he stated that laws impairing the obligation of contract are "atrocious breaches of moral obligation and social justice." *The Federalist* No. 7 (Hamilton) at 65 (C. Rossiter ed. 1961).[7] The Court should review the State of Utah's retroactive imposition of $6 million in damage liability upon Petitioner to restore Contract Clause protection to those who contract with the State of Utah and to prevent the serious constitutional

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[7] Elbridge Gerry, in fact, argued that the Contract Clause should apply to the *federal* government because preserving contractual obligations was a matter of "public faith." 2 *Records of the Federal Convention of 1787* at 619 (Farrand ed. 1911). *Cf. United States v. Winstar*, 116 S.Ct. at 2455 ("[a]lthough the Contract Clause has no application to acts of the United States. * * * it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights").

injuires that—absent review—the Utah Supreme Court's disregard of that protection could well inflict elsewhere.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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